(1)

90-1005
No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1990

LLOYD BAKER,

Petitioner,

v.

MECKLENBURG COUNTY, NORTH CAROLINA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING APPENDIX

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I - QUESTION PRESENTED FOR REVIEW

Can an appellate court appropriately review the issue of the sufficiency of the evidence to see whether it supports a jury verdict and hold that it is insufficient when the defendants explicitly limit their motion for a judgment notwithstanding the verdict (j.n.o.v.) to the single ground that the plaintiff's remarks to the district attorney about the alleged financial improprieties of his superior are not protected by the First Amendment of the United States Constitution since they are not a matter of "public concern" in that they were motivated by plaintiff's privately motivated desire for "revenge" and none of the defendants' motions for directed verdict contained the specific reason that there was no evidence of a causal connection between the remarks and adverse employment decisions?

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II - LISTING OF PARTIES

The parties are:

(a) Lloyd Baker, plaintiff (petitioner herein), employee of defendant Mecklenburg County, North Carolina.

(b) Defendants (Respondents herein):

(i) Mecklenburg County, North Carolina;

(ii) Gerald Fox, County Manager;

(iii) Harry Weatherly, Director of Finance of Mecklenburg County and immediate superior of Lloyd Baker;

(iv) Louie Strickland, Mecklenburg County Personnel Director.

III - REFERENCES TO OPINIONS

Set forth in the attached Appendix are the opinions in this action. All are unreported. The opinions are: the opinion, as corrected, upon which this petition is seeking relief from (App. 1 - App. 24); district court order/judgment (App. 24 - App. 37); and appellate order denying rehearing (App. 38 - App. 39).

IV - GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is being invoked pursuant to 28 U.S.C. § 1254. The Fourth Circuit's opinion (App. 1 - App. 22) was dated August 27, 1990 (App. 1). A correction to the dissent (App. 23 - App. 24) was filed on September 20, 1990 (App. 23). The appellate order denying plaintiff's motion for rehearing (App. 38 - App. 39) was filed on September 27, 1990 (App. 38).

The Fourth Circuit Court of Appeals considered the issue of the sufficiency of all

of the evidence as to all defendants when the issue of the sufficiency of the evidence in the defendants' motions for directed verdict was limited to one particular ground as to two (Weatherly, Strickland) of the four defendants and was entirely absent from both the remaining two defendants (Fox, Mecklenburg County) and the defendants' motion for judgment notwithstanding the verdict (j.n.o.v.). This action of the appellate court conflicts with the following decisions from other circuits: Orlando v. Billcon International, et al., 822 F.2d 1294, 1298 (3rd Cir. 1987); Reichman v. Bonsignore, et al., 818 F.2d 278, 281 (2nd Cir. 1987); Walters v. City of Atlanta, et al., 803 F.2d 1135, 1146 (11th Cir. 1986); and, Fishman v. Clancy, 763 F.2d 485, 489 (1st Cir. 1985). This action of the appellate Court appears to be a departure from the accepted and usual course of judicial proceedings.

V - STATUTE INVOLVED IN THIS CASE

The statute involved in this case is 28 U.S.C. Federal Rules of Civil Procedure Rules 50(a) and 50(b). The text of same is set forth in the attached Appendix at App. 53 - App. 54.

VI - STATEMENT OF THE CASE

The plaintiff, Lloyd Baker, filed his Complaint on May 2, 1986. Jurisdiction was conferred upon the district court pursuant to 28 USC § 1343(a)(3) since the claim was based on 42 USC § 1983 and the First and Fourteenth Amendments of the United States Constitution. Baker alleged that because he went to the local District Attorney (Gilchrist) about what he perceived as either improper or criminal activity on the part of his immediate superior he was subjected to various adverse employment decisions. Baker made his claims pursuant to 42 USC § 1983 (subjected

to retaliatory and adverse employment decisions because Baker exercised his First Amendment rights by going to District Attorney Gilchrist about Alberty's activities). The named defendants are: Mecklenburg County; Gerald Fox, County Manager; Harry Weatherly, Finance Director; and, Louie Strickland, Personnel Director.

Baker specifically alleged the following adverse employment decisions: removal of specific duties; Alberty's job as Assistant County Manager remained unfilled and eventually was eliminated so that Baker could not get it; Baker's job title was changed in January, 1985, his wages were frozen and his pay grade lowered; and, he was gradually lowered in rank within the Finance Department.

The case was submitted to the jury on the following § 1983 issues: selection of Weatherly as Acting Finance Director;

selection of Weatherly as the permanent Finance Director; December, 1985 job performance review rating; and, the reclassification of plaintiff's job position in January, 1985. The jury awarded $27,400.00 in damages in finding for Baker on three of the four issues (App. 24-25).

The District Court denied the defendants'-motion for judgment notwithstanding the verdict (j.n.o.v.). The District Court entered judgment, specific relief, costs and fees (App. 24-37). The defendants filed a timely notice of appeal.

The appellate decision, over a dissent: addressed the issue of the "sufficiency of the evidence"; declared that the District Court had been "alerted" to the issue of the sufficiency of the evidence after stating that the issue "could have been raised more clearly"; distinguished cases cited by Baker; and, held that since the evidence only raised

a "possibility" instead of the required "probability", the case should not have been submitted to the jury (App. 1-20). The dissenting opinion: did not specifically address the question of whether the "sufficiency of the evidence" issue was properly before the Court; and, found the evidence to be sufficient for submission to the jury (App. 21-22). A petition for rehearing was denied (App. 41-42).

After the jury trial, the defendants filed a j.n.o.v. motion wherein they stated:

> 1. At the close of the plaintiff's evidence, the defendants moved for directed verdicts pursuant to Fed. R. of Civ. P. 50(a) upon the basis (1) that the plaintiff's evidence with respect to his second cause of action (the pendent North Carolina tort of intentional infliction of emotional distress) was insufficient to make out a prima facie case, (2) that the plaintiff's evidence with respect to Messrs. Strickland and Weatherly upon the first cause of action (alleged retaliation for exercise of First Amendment rights) was insufficient to go to the jury as to those defendants because Messrs. Strickland and Weatherly had no knowledge or information with regard to the exercise of the First Amendment rights, and (3) that the

plaintiff's remarks were to further his purely private interest in retaining or maintaining his position with the Finance Department and that the comments were, accordingly, not protected against employer retaliation by any of the defendants. All motions were denied without prejudice.

At the close of all the evidence, the defendants repeated all of their motions for directed verdicts. The defendants' motions with regard to the North Carolina tort of intentional infliction of emotional distress were granted. All other motions were denied.

This motion for judgment notwithstanding the verdict pertains to all issues answered in favor of the plaintiff and is made upon the third proposition mentioned above, i.e., that where the sole point or purpose of the plaintiff's remarks was to further his purely private interest of retaining or maintaining his own position with the Finance Department, his comments lacked First Amendment protection against employer reaction. (App. 40-42) (emphasis supplied)

Defendant's counsel stated that:

he (Baker) is entitled to to to the jury as to Mr. Fox because he did have information, as to Mr. Fox alone and on

the subject of Mr. Fox's recommendation that Mr. Weatherly be named acting Finance Director...[1] (parenthesis added)

VII - ARGUMENT

A. The Court of Appeals Decision In This Case Conflicts With Decisions Of Other Circuits

In this case the Court of Appeals held as follows:

> The County and the individual defendants argue that this court should reverse the decision below because there is insufficient evidence to show that protected speech was the motivating factor in any adverse employment decision. In response, Baker claims that the defendants waived their argument regarding the sufficiency of the evidence by failing to properly raise it below.
>
> Perhaps the sufficiency of the evidence argument could have been raised more clearly below in the motions for directed verdict and judgment n.o.v.

---

1. The claim against Fox was dismissed by the majority appellate opinion because of insufficient evidence. (App. 10-12) This claim was never the subject of any Rule 50(a) motion made by the defendants. (App. 43-45) This shows the sweeping nature of the majority opinion's improper consideration of the "insufficiency of evidence" issue.

> However, we find that the defendants' Rule 50(a) motion for a directed verdict alerted the district court to this issue and that the defendants sought to renew this argument in the motion for judgment n.o.v. ...in this case, the court below was adequately informed at the close of all of the evidence of the nature of the defendants' contention that there was a deficiency in the evidence. (App. 8-9)

When one compares the holding of the Court of Appeals with the record, it is explicitly clear that the appellate decision conflicts with the record in the following ways:

(a) The Court of Appeals stated that the defendants' j.n.o.v. motion "sought to renew" the issue of the sufficiency of the evidence. (App. 8) The defendants' j.n.o.v. motion limits itself to the following:

> This motion for judgment notwithstanding the verdict pertains to all issues answered in favor of the plaintiff and is made upon the third proposition mentioned above, i.e., that where the sole point or purpose of the plaintiff's remarks was to further his purely private interest of retaining or main-

taining his own positions with the Finance Department, his comments lacked First Amendment protection against employer reaction. (App. 45)

(b) The Court of Appeals found that the motions for a directed verdict and j.n.o.v. properly alerted the district court to the issue of the sufficiency of the evidence as to all adverse employment decisions. (App. 8-9) The defendants' motions for a directed verdict raise the sufficiency of evidence issue as to two defendants (Weatherly, Strickland) but not to the third and fourth defendants (Fox; Mecklenburg County). The defendants' j.n.o.v. motion is not concerned with the sufficiency of evidence issue since it explicitly argues only the "public concern" issue. (App. 43-45)

The Court of Appeals' decision to entertain the "sufficiency of evidence issue" below conflicts with various circuit opinions.

(a) Walters v. City of Atlanta, 803

F.2d 1135, 1146 (11th Cir. 1986): In Walters, the defendants, at the trial level asserted that the issue of damages for mental distress should not go to the jury because there was insufficient proof of the tort for intentional infliction of emotional distress. The issue was submitted to the jury. The jury returned a verdict which included damages for mental distress. The defendants, on appeal, argued that there was insufficient proof of damages for mental distress. The appellate court declined to consider the issue and stated:

> Any deficiency in the evidence which is not specifically addressed in the motion for directed verdict may not be raised on appeal...To perserve such a claim for appeal, a party must squarely present it to the trial court and afford that Court the initial opportunity to consider it. (Emphasis added)

(b) Reichman v. Bonsignore, et al., 818 F.2d 278, 281 (2nd Cir. 1987): This is an age discrimination in employment case. The willfulness issue was submitted to the jury. On appeal, the employer challenged the

sufficiency of the evidence on the willfulness issue. The Reichman court declined to consider the issue and stated:

> Under these circumstances, where the specific contention was never called to the District Court's attention, appellate review of the sufficiency of the evidence of the evidence on that point is inappropriate. (citation omitted) (Emphasis added)

(c) Orlando v. Billcon International et al., 822 F.2d 1294, 1298 (3rd Cir. 1987): In Orlando, the district court granted the defendants' j.n.o.v. motion after the jury returned a verdict in favor of the plaintiff on his "tortious interference" claim. The district court granted the j.n.o.v. motion because of the plaintiff's failure to prove lost profits. The appellate court reversed the district court because the specific issue of insufficient evidence as to lost profits was not present in the defendants' motions for a directed verdict.

(d) Fishman v. Clancy, 763 F.2d 485, 489 (1st Cir. 1985): The First Circuit

stated that where a defendant failed to object to the submission of the issue of punitive damages to a jury, the failure to object ordinarily precludes appellate review of the issue of the sufficiency of evidence as to punitive damages.

The conflict between the Court of Appeals' decision and the above ctied circuit decisions arises in that the foregoing authorities require that the issue upon which the appellant seeks review must have been "specifically raised" (Walters; Reichman; Orlando; and Fishman) and "squarely presented" (Walters) to the trial court. If one compares the issue on appeal ("because there is insufficient evidence to show that protected speech was the motivating factor in any adverse employment decision..."; (App. 8) with the defendants' motions for a directed verdict and j.n.o.v. (App. 43-45) it is clear that said issue was neither "specifically raised" nor "squarely presented" to the trial

court. In fact, the Court of Appeals acknowledged that "Perhaps the sufficiency of the evidence argument could have been raised more clearly below in the motions for directed verdict and judgment n.o.v." (App.8) The Court of Appeals clearly should not have considered the issue since it was not "specifically raised" and "squarely presented" to the trial court.

A detailed analysis of the defendants' motions for a directed verdict and j.n.o.v. and the Court of Appeals' decision shows that the "sufficiency of evidence" issue was inappropriately considered by the Court of Appeals.

(a) The defendants' motions for directed verdict only addressed the sufficiency of evidence as to defendants Weatherly and Strickland. This issue was further limited to the factual issue of whether Strickland and Weatherly were aware

of Baker's remarks prior to the time of the adverse employment decisions. (App. 43-45)

(b) The defendants' motions for a directed verdict utterly fail to make any mention of defendants Fox and Mecklenburg County.

(c) The defendants' j.n.o.v. motion is limited to the issue of whether Baker's remarks are a matter of "public concern." It utterly fails to make any sufficiency of evidence argument. (App. 43-45)

(d) The Court of Appeals defined the appellate issue as "insufficient evidence to show that the protected speech was the motivating factor in any adverse employment decision." (App. 8) This precise issue was never presented in the defendants' motions for directed verdict and j.n.o.v.

(e) The Court of Appeals held that there was insufficient evidence as to Baker's claim against Fox (App. 10-11) This issue

was never raised by the defendants in their motions.

It is clear that the Court of Appeals inappropriately considered the precise issue of the sufficiency of evidence to show a causal connection between the remarks and the adverse employment decisions. The defendants' motions for a directed verdict do not contain this precise ground. Furthermore, by the time of their j.n.o.v. motion, the defendants have abandoned "any of the sufficiency of evidence" resons and explicitly limit their emphasis to the "public concern" issue. The Court of Appeals erred when it relaxed the "specifically raised" and "squarely presented" requirements set forth in Walters, Reichman, Orlando and Fishman, supra. In so relaxing the standard, the Court of Appeals thwarted the purpose of Rule 50 and rendered a decision which conflicts with the above cited authorities.

B. The Court Of Appeals Decision Has So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Powers

It appears to the petitioner that a decision of the Court of Appeals is a far departure from the accepted and usual course of judicial proceedings. This is because of the Court of Appeals "relaxed" standard referred to above when the usual standard is the "specifically raised" (Orlando, Reichman, Walters and Fishman, supra) and "squarely presented" (Walters) to the district court. Petitioner submits that the supervisory powers of this Court should be exercised because of the importance of the issue.

C. The Issue of The Scope of Appellant Review Under These Circumstances Is Important Enough For This Court To Grant The Petition

The issue of importance is a factor in deciding whether a petition will be granted. It is a relative factor affected by many matters. See e.g. Stern and Gressman, Supreme Court Practice, 5th Ed., pp. 284-285 (B.N.A. 1978).

Baker submits that the issue raised herein is one of critical and practical importance. Some circuits (Orlando, Reichman, Walters, Fishman) require that each basis of the Rule 50 motion for directed verdict or j.n.o.v. be "specifically raised" and "squarely presented" to the trial court so that it can have the first opportunity to consider the precise issue. Furthermore, these requirements present the non-moving party with a opportunity to re-open the case and present evidence on the precise issue.

On the other hand, at least in this case, the Fourth Circuit only requires that the trial court be "alerted". (App. 8) This relaxed "alerting" standard avoids the precision and specificity required by the authorities cited herein. It also enables the appellate court to either review issues which are not properly before it or to review issues broader than those contained in the motions for directed verdict or j.n.o.v. Either situation results in the purpose of Rule 50 being thwarted.

The purposes of Rule 50 are to: provide a device whereby a trial court can enforce rules of law; iron out procedural complexities; and, raise and preserve legal questions concerning the sufficiency of the evidence. Wright and Miller, Federal Practice And Procedure, Civil § 2521, Vol. 9, p. 537 (West Publishing, 1971). The requirement is that the specific reasons for either a motion for directed verdict or j.n.o.v. must be stated.

The requirement is important. Wright, Civil §§ 2533, 2537. Strict compliance with the procedural provisions of Rule 50 is necessary in order to obtain appellate review of the issues raised in the Rule 50 motions. See Wright, Civil § 2540 and authorities cited above. In this case, the Fourth Circuit, by utilizing the "relaxed standard" reviewed matters clearly beyond the appropriate scope. Such an approach deprives Rule 50 of the uniformity sought by the Rules of Civil Procedure.

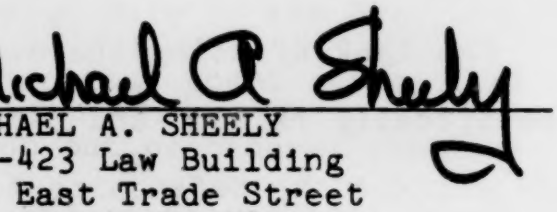
The lack of using the strict standard of "specifically raised" and "squarely presented" allowed the defendants to escape the consequences of their decisions. The defendants chose the limited grounds (sufficiency of evidence for one reason and two of four defendants) set forth in their motions for directed verdict and the even more limited ground (Baker's remarks are not a matter of

public concern) of their j.n.o.v. motion. This escape was provided by the appellate court's decision to review a specific issue which was not raised in their Rule 50 motions. It is important that a defendant be required to live with the results of his or her choices.

VIII - CONCLUSION

For the reasons set forth herein, this Court should grant Mr. Baker's petition.

This the 18 day of December, 1990.



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 88-2097

LLOYD BAKER,

Plaintiff-Appellee,

versus

MECKLENBURG COUNTY, NORTH CAROLINA; GERALD G. FOX, individually and as county manager; LOUIS JOE STRICKLAND, individually and as personnel director; J. HARRY WEATHERLY, JR., individually and as finance officer,

Defendants-Appellants,

and

NATHAN E. ALBERTY,

Defendant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, Senior District Judge. (CA-86-232k-C-C-M)

Argued: March 8, 1990

Decided: August 27, 1990

Before ERVIN, Chief Judge, and HALL and WILKINS, Circuit Judges.

Reversed by unpublished per curiam opinion. Judge Hall wrote a dissenting opinion.

ARGUED: James Orr Cobb, Jr., RUFF, BOND, COBB, WADE & MCNAIR, Charlotte, North Carolina, for Appellants. Michael Anthony Sheely, Charlotte, North Carolina, for Appellee. ON BRIEF: Shelly Blum, Charlotte, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Mecklenburg County, Gerald G. Fox, Louie Joe Strickland, and J. Harry Weatherly appeal from a jury verdict which found them guilty of violating Lloyd Baker's first amendment rights. The jury awarded Baker $27,400 in damages after finding that the various defendants discriminated against him in making employment decisions because he told the County Manager and the District Attorney that his supervisor was misusing County funds. After thoroughly reviewing the record and hearing oral argument we reverse the judgment of the lower court because there is insufficient evidence that the employment decisions were made in retaliation against Baker because of his statements about the misuse of County funds.

I.

Lloyd Baker was Accounting Manager in the Mecklenburg County Finance Department under Finance Director Nathan Alberty from

1976 until 1982. In July, 1982 Alberty announced his decision to reorganize the department. He split it into two units--"Finance and Administration" and "Operations." Alberty placed Baker at the head of Operations and selected Harry Weatherly, formerly Baker's subordinate, to manage the Finance and Administration Unit. Before the reorganization, Weatherly reported to Baker. After the reorganization, Weatherly reported directly to Alberty, Baker was given fewer responsibilities, and Baker was instructed to report to Weatherly in Alberty's absence.

Baker complained about the reorganization. He spoke to Strickland, the County Personnel Director, to Fox, the County Manager, and to Alberty himself about it. The main topic of these meetings was Alberty's authority to reorganize the department. However, Baker also told Fox about what he thought were financial improprieties

on the part of Alberty. Baker claimed that Alberty had used County employees for outside business activities. Baker first learned of these alleged improprieties in May of 1980. The first time he mentioned them to anyone was in a July 1982 meeting with Fox. Because Fox did not act on the matter, Baker met with District Attorney Peter Gilchrist to discuss Alberty's alleged misuse of funds in August 1982.

In November 1982, the District Attorney talked to Fox about conducting a criminal investigation of Alberty in connection with a matter unrelated to Baker's complaints. As part of the investigation, Gilchrist asked Baker to meet with a State Bureau of Investigation agent. This meeting took place in April 1983. The subject of the meeting was Baker's knowledge, if any, of alleged kickbacks received by Alberty in connection with computer contracts. Baker had no knowledge of any such kickbacks.

In 1983 County Manager Fox recommended that the Board of County Commissioners terminate Alberty's position as Finance Director. On Fox's recommendation, the Board chose Weatherly for the position of acting Finance Director.[1]

During a meeting of the Finance Department in June of 1983, Fox made an announcement that Alberty had been placed on leave. Fox also stated that there had been a departmental leak to the news media from the finance office. Baker commented that he was being blamed for the leak because he had gone to the District Attorney in 1982. Weatherly was present at this meeting; however, Strickland was not a Finance Department employee and did not attend the meeting.

Baker filed a suit against Mecklenburg County, Fox, Strickland, Weatherly and Alberty claiming that they retaliated against

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1. In May 1984 Weatherly was selected to be the permanent Finance Director.

him because he told Fox and Gilchrist that Alberty was misusing County funds. Specifically, Baker claimed that: (1) Fox submitted only Weatherly's name to the Board of Commissioners as a candidate for acting Finance Director, (2) Weatherly lowered Baker's performance ratings as a result of his statements, (3) Weatherly failed to support him as a manager and reduced his responsibilities from 1984 through 1987, and (4) Fox, Weatherly, and Strickland were responsible for reclassifying his job.

Baker settled all claims against Alberty. The remaining claims were presented to a jury which found that Fox retaliated against Baker by recommending that Weatherly be the acting Director of Finance, that no retaliation was involved in the selection of Weatherly rather than Baker as Director of Finance in 1984, that Weatherly retaliated against Baker by lowering his job performance evaluation in 1985, and that Fox, Weatherly,

and Strickland retaliated against Baker by reclassifying his job position in January, 1985.

II.

The County and the individual defendants argue that this court should reverse the decision below because there is insufficient evidence to show that protected speech was the motivating factor in any adverse employment decision. In response, Baker claims that the defendants waived their argument regarding the sufficiency of the evidence by failing to properly raise it below.

Perhaps the sufficiency of the evidence argument could have been raised more clearly below in the motions for directed verdict and judgment n.o.v. However, we find that the defendants' Rule 50(a) motion for a directed verdict alerted the district court to this issue and that the defendants sought to renew this argument in the motion for judgment n.o.v. The cases cited by Baker in which the

court refused to review an issue because it was not presented in a motion for a directed verdict at the close of the evidence can all be distinguished because, in this case, the court below was adequately informed at the close of all of the evidence of the nature of the defendants' contention that there was a deficiency in the evidence.[2]

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2. Baker cites Kinzenbaw v. Deere & Co., 741 F.2d 383, 387 (Fed. Cir. 1984), cert. denied, 470 U.S. 1004 (1985); Litman v. Mass Mutual, 739 F.2d 1549, 1556-57 (11th Cir. 1984); Orthokinetics, Inc. v. Safety Travel Chairs, Inc., 806 F.2d 1565 (Fed. Cir. 1986); Walters v. City of Atlanta, 803 F.2d 1135, 1146 (11th Cir. 1986); Hughes v. Halifax County School Bd., 855 F.2d 183 (4th Cir. 1988), cert. denied, 109 S.Ct. 867 (1989); and Federal Sav. & Loan Ins. Corp. v. Reeves, 816 F.2d 130, 137-38 (4th Cir. 1987). In Kinzenbaw, Litman, Orthokinetics and Walters, the appellant failed to raise the contested issue in a motion for a directed verdict after the close of the evidence. In Litman, the defendant raised his argument in a motion for directed verdict after the plaintiff's case, however, the appellant did not reassert his argument at the close of all of the evidence. Furthermore, in response to the motion at the close of plaintiff's evidence, the trial

III.

We agree with the defendants that there is insufficient evidence in the record to support the verdict. In Whalen v. Roanoke County Board of Supervisors, 797 F.2d 170 (4th Cir. 1986) (en banc), this court held that an issue must be supported by evidence which shows a "probability" of proof rather than a mere "possibility" before it properly can be submitted to a jury. Baker failed to make that showing in this case.

The first question submitted to the jury was whether the selection of Weatherly to be the acting Director of Finance rather than Baker violated Baker's first amendment rights. At trial, Baker claimed that Fox retaliated against him by recommending Weatherly to the Board of County

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court determined that the issue had not been preserved for trial. In the Fourth Circuit cases, Hughes, Reeves, and Miller, this court did not refuse to review the contested issues.

Commisioners for the position of acting Finance Director. Fox testified that he recommended Weatherly because for the previous year and a half, Fox had had an opportunity to work with Weatherly. According to Fox, since the 1982 reorganization, Weatherly was essentially second in command and acted in Alberty's stead.

After reviewing the record, we find that there is insufficient evidence of retaliation. Weatherly was a logical choice to fill the position of acting Finance Director, and there is no evidence showing that Fox had any reason to retaliate against Baker. There is no evidence that Alberty and Fox were close friends or that Fox would wish to retaliate against Baker for any other reason for remarks made against Alberty. In fact, Fox eventually fired Alberty for reasons totally unrelated to Baker's allegations. We thus find that there is insufficient evidence to prove that Fox chose Weatherly in retaliation

against Baker for making statements protected by the first amendment.

The next question presented to the jury was whether Weatherly retaliated against Baker by lowering his performance ratings in 1985. Baker argues that Weatherly lowered his performance ratings because he told Fox and Gilchrist that Alberty was misusing County funds. Again, we find that there is insufficient evidence to support a verdict against the defendant, Weatherly.

First, there is little, if any, evidence showing that Weatherly knew about Baker's statements to Fox and Gilchrist in 1982 and 1983. Weatherly testified that he had no knowledge of Baker's reports. Baker has shown no evidence that anyone told Weatherly about the reports or that Weatherly ever mentioned the meetings. Rather, Baker claims that Weatherly overheard Baker's remark to Fox at the 1983 departmental meeting that he had gone to the District Attorney. This is

not evidence showing a probability of proof.

In addition, there is no evidence to show that Weatherly had a reason to retaliate against Baker for making remarks against Alberty. It seems obvious that Weatherly's motive for criticizing Baker's performance, if any, was not any statement made against Alberty, but rather Baker's complaints about the reorganization of the department in which Alberty promoted Weatherly. Baker's protest against the reorganization is not protected speech under the first amendment and cannot be a basis for the jury verdict.

Finally, the jury was asked whether Weatherly, Strickland, or Fox reclassified Baker's job to retaliate against him for his statements about the misuse of County funds by Alberty. Again, there is scant, if any, evidence supporting a verdict against the defendants on this claim.

In 1985, the County Personnel Department conducted an evaluation of Finance Department

jobs. It was a routine practice for the classification and compensation division (the "division") of the County Personnel Department to evaluate job positions at the request of a department every time changes were made in employee positions or department operations. Alberty requested the study after he reorganized the Finance Department.

A member of the division explained that the reclassification was based upon information provided by the employees and their supervisors about their responsibilities. The division does not promote or demote employees. Rather, the division studies questionnaires that are completed by the employees, and gives the job position a score according to factors such as the degree of responsibility and difficulty of the job, etc. The score places the job within the County's pay plan. Based upon this study, the division determines whether the position needs to be retitled.

Baker's job reclassification was based upon information provided by Baker about his responsibilities in 1984. Because of a reduction in his duties, the division recommended a reclassification of his job and a freeze on his pay potential. His salary was not reduced. As a matter of routine practice, Strickland and Fox approved the reclassification. However, they were not involved in the decision to conduct the study or the decision to reclassify Baker's position.

Just as there is insufficient evidence to show that Weatherly retaliated against Baker because of Baker's statements to Fox and Gilchrist by lowering Baker's performance ratings, there is also insufficient evidence to show that Weatherly retaliated against him by reclassifying his job. Alberty asked the classification division to study the Finance Department after he reorganized the department. The division recommended the change in

Baker's title and salarly potential based upon information supplied by Baker in 1984. While Weatherly may have been partially responsible for the fact that Baker had fewer responsibilities in 1984 than he had prior to that time, the evidence does not show a probability that Weatherly reduced Baker's responsibilities because of Baker's statements about Alberty. Again, the record shows little, if any, evidence that Weatherly knew about Baker's conversations with Fox and Gilchrist, and even less evidence that Weatherly was motivated to make any employment decision based upon those statements.

There is also no evidence showing that Strickland knew about Baker's reports or was motivated to retaliate against Baker. Strickland testified that he was unaware of Baker's statements to Fox and the District Attorney until after Baker filed this lawsuit. Fox testified that he never

revealed any of the Alberty information to Strickland. Baker provided no evidence that anyone ever told Strickland about his allegations against Alberty. As evidence of Strickland's knowledge of the reports, Baker points to the testimony of employee Patricia Grigg who testified that she overheard Strickland remark to County employee Alan McBrayer:

> I'm sorry I had to be so hard on you.... Did you see me set him up? I set him up like a clay pigeon....

The statement was made after a meeting called to determine whether or not an employee, Ana Dixon, should be disciplined for writing a check without prior approval. Grigg believed that Strickland was telling McBrayer that Strickland had "set up" Baker.

McBrayer and Strickland, however, testified that Strickland was not talking about Baker, but about McBraye. According to McBrayer, Strickland told him that he had asked McBrayer some pretty rough questions in

the disciplinary meeting. Strickland's questions had forced McBrayer to take a viewpoint directly opposed to Baker's opinion. Baker was McBrayer's immediate superior at the time. Strickland indicated that he hoped that he had not set up McBrayer for retaliation by Baker.

Grigg's testimony is hardly evidence of "probability" that Strickland knew about Baker's reports to Fox and Gilchrist or that Strickland retaliated against Baker because of those reports. This is only speculation by an employee who overheard a vague remark about what the remark meant. Furthermore, in addition to the absence of evidence of Strickland's knowledge of Baker's complaints about Alberty, we note the fact that the reclassification of Baker's job occurred in 1985, over two and a half years after Baker's meetings with Fox and Gilchrist. We also note that Strickland did not initiate the job evaluation or participate in the decision to

reclassify Baker's job. Strickland merely approved a recommendation by the classification and compensation division.

There is also insufficient evidence that Fox retaliated against Baker. Fox, of course, knew about Baker's accusations. However, there is no evidence that Fox wanted to demote Baker because of his allegations. Like Strickland, Fox merely signed a decision made by another group of employees to reclassify Baker's position.

IV.

The County also argues that Baker's statements about Alberty's alleged misuse of County funds were not a matter of public concern because Baker was acting in his own private interest. Because we find that there was insufficient evidence showing a casual connection between the statements and the alleged employment decisions, we need not reach this issue.

V.

Having searched the record for evidence to support the jury verdict but having failed to find it, we reverse the district court's order awarding judgment for Baker.

REVERSED

HALL, Circuit Judge, dissenting:

I would not disturb the jury verdict in this case.

If this court sat as a de novo trier of facts, and I were called upon to draw the most reasonable inference from direct evidence in the cold record, I would perhaps agree with the version concluded upon by the majority. Nonetheless, the appellate perch is a much more difficult place to find facts than is a jury box. Consequently, we are not assigned the arduous duty to conduct a quest for the ultimate truth in every case; when our limited examination discovers controverted evidence which reasonable minds may interpret differently, our inquiry is at an end.

From 1982 until the filing of this case Baker's status, responsibility, and treatment at work steadily and inexorably declined. Fox's admonitions about news leaks when Alberty resigned certainly tend to show that

employee whistleblowing was discouraged; by the timing of the remarks, they show that Fox attributed Alberty's downfall, at least in part, to such whistleblowing. Strickland's "clay pigeon" comment can be reasonably read as evidence of deliberate intent to discriminate against Baker.

The district court concluded that there was sufficent evidence to put all inferences necessary to Baker's case within the verdict. Though, as my colleagues' majority opinion shows, other reasonable minds might have reached a contrary result, there was sufficient evidence to support the judgment.

I repectfully dissent.*

---

* Because of its disposition of this appeal, the majority declines to address what the parties treated as the focal issue--whether Baker's statements involved "matters of public concern." See Connick v. Myers, 461 U.S. 138 (1983). They plainly do. The public should be as vitally concerned with allegations of financial improprieties by those entrusted with public funds as is a farmer whose henhouse is guarded by the proverbial fox.

Filed: September 20, 1990

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2097
(CA-86-232-C-C-M)

Lloyd Baker,

Plaintiff - Appellee,

versus

Mecklenburg County, et al,

Defendants - Appellants.

O R D E R

The Court amends its opinion filed August 27, 1990, as follows:

On page 14, 4th full paragraph -- a new line 3 is inserted. The paragraph now reads:

> The district court concluded that there is sufficient evidence to put all inferences necessary to Baker's case within the range of probability. This conclusion was vindicated by the jury's verdict. Though, as my colleagues' majority opinion shows, other reasonable minds might have reached a contrary result, there was sufficient evidence to support the judgment.

For the Court - By Direction

/s/ John M. Greacen

CLERK

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-86-232-M

LLOYD BAKER, Plaintiff, -vs- MECKLENBURG COUNTY, NORTH CAROLINA; GERALD G. FOX, individually and as County Manager; LOUIE JOE STRICKLAND, individually and as Personnel Director; J. HARRY WEATHERLY, JR., individually, and as Finance Officer; and NATHAN E. ALBERTY, Defendants.	)	ORDER

This § 1983 case was tried to a jury beginning on December 3, 1987, and on December 9, 197, the jury returned a verdict in favor of the plaintiff, finding as follows:

> "Were the plaintiff's rights of free speech under the First Amendment of the United States Constitution violated by:
>
> "1. Selection of Weatherly rather than plaintiff to be the Acting Director of Finance in June, 1983?
>
> "ANSWER: Yes

"If so, what amount is the plaintiff entitled to recover of defendants Mecklenburg County and Fox?

"ANSWER: $2,000.00

"2. Selection of Weatherly rather than plaintiff to be Permanent Director of Finance in 1984?

"ANSWER: No

"If so, what amount is the plaintiff entitled to recover of defendants Mecklenburg County?

"ANSWER: None

"3. Unfavorable evaluation of plaintiff's job performance in 1985?

"ANSWER: Yes

"If so, what amount is the plaintiff entitled to recover of defendants Mecklenburg County and Weatherly?

"ANSWER: $5,100.00

"4. Reclassification of plaintiff's job position from Accounting Manager to General Accounting and Disbursement Manager in January, 1985, by:

"a. Mr. Fox and Mecklenburg County

ANSWER: Yes

"b. Mr. Weatherly and Mecklenburg County

ANSWER: Yes

"c. Mr. Strickland and Mecklenburg County

ANSWER: Yes

"If the answer to issue 4 is yes as to any one or more of the defendants, what amount is the plaintiff entitled to recover?

ANSWER: $20,300.00"

On December 14, 1987, plaintiff filed a motion for relief, asking (1) that his salary be adjusted to the appropriate level; (2) that his 1985 and 1986 performance evaluations be corrected; (3) that his current job title and pay scale be corrected; (4) that the defendants be ordered not to make any adverse employment decision affecting him on the basis of his visits to the District Attorney or his bringing this lawsuit; and (5) that he recover costs and attorney's fees.

On December 17, 1987, defendants filed a motion for judgment notwithstanding the verdict. Plaintiff responded to defendants' motion on December 22, 1987. Defendants

responded to plaintiff's motion for attorney fees and costs on December 23, 1987, and filed a post-trial memorandum on January 4, 1988.

All pending motions were heard on January 14, 1988, and are decided as set forth below.

Defendants' motion for Judgment Notwithstanding the Verdict.--Defendants maintain that the plaintiff's speech does not warrant First Amendment protection because plaintiff's sole purpose in speaking to the District Attorney about the alleged criminal acts of former Assistant County Manager Alberty was to further plaintiff's purely private interest of retaining or maintaining his own position with the county Finance department.

Defendants do not deny that Alberty's alleged criminal activities and breaches of public trust were matters of public concern. Instead they contend that speech by a public

employee, regardless of its content, does not warrant First Amendment protection if the public employee speaks as a disgruntled employee and not as a concerned citizen.

Defendant's assertion that the speaker's motives, rather than the speech's content, determine the scope of First Amendment protections is incorrect.

When a public employee claims to have suffered discrimination because of that employee's exercise of rights guaranteed by the first amendment to the United States Constitution, the reviewing court must make a two-step analysis. The court must first determine if the subject speech is a matter of public concern. See, Connick v. Myers, 461 U.S. 138 (1983). If the speech is a matter of public concern the court must perform a balancing inquiry and determine if the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an efficient

workplace. See, Pickering v. Board of Education, 391 U.S. 563 (1968); Piver v. Pender County Board of Education et al., ___ F.2d ___ (4th Cir. 1987) No. 87-2536.

In assessing whether the subject speech is about a matter of public concern the focus is on "whether the 'public' or the 'community' is likely to be truely concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee." Berger v. Battaglia, 779 F.2d 992, 998-99 (4th Cir. 1985); Piver v. Pender, at ___. The speaker's motives may be relevant to the inquiry but they are not dispositive.

When plaintiff spoke with the local District Attorney he did not complain about his working conditions, a personal grievance or the reorganization of the County's Finance Department. He complained about then Assistant County Manager Nathan Alberty's

stealing money and property from the County's till. Plaintiff began learning about Alberty's alleged wrongdoings in late 1980 and communicated his concerns about these improprieties to the District Attorney in August 1982. Defendants maintain that the only reason plaintiff went to the district Attorney in August 1982, was that he was upset with Alberty's reorganization of the Finance Department in July 1982, and its impact on plaintiff's job responsibilities. Defendants' argument ignores the credible testimony of plaintiff that he was fearful of revealing the 1980 wrongdoing prior to the time that he did, because of possible retaliation by Alberty; that he went to the District Attorney as a citizen concerned about a public matter; and that he spoke with the District Attorney about alleged wrongdoings between March and June, 1982, as well as the alleged wrongdoings in June, 1980.

Plaintiff "blew the whistle" on Alberty's padded expense account. The subject speech was clearly a matter of public concern and since the defendants do not claim that the efficient running of the County's offices has been in any way harmed by plaintiff's speech, the speech is deserving of constitutional protections.

Defendants' motion for judgment notwithstanding the verdict is DENIED.

Plaintiff's motion for relief.

Plaintiff is entitled to relief as follows:

1. Adjustment of plaintiff's salary to the appropriate pay grade and classification. --In answer to issue number 4 the jury found that the 1985 reclassification of plaintiff's job from Accounting Manager to General Accounting and Disbursement Manager was retaliatory. When plaintiff was reclassified his salary was frozen, his job title was changed, and his pay range was lowered from "SAM Grade 3, step 7 to SAM Grade 7, step 7."

To make plaintiff whole he must be placed in the position he was in before the retaliatory reclassification took place. The defendants and the court are not free to speculate as to how or to what level plaintiff's position might have been reclassified, free from discrimination, during the ensuing years.

2. Job performance evaluations.--In answer to issue number 3, the jury found that the unfavorable rating on plaintiff's 1985 job evaluation was retaliatory. Plaintiff requests that the numerical rating on his 1985 and 1986 performance evaluation be changed to 74.5, the rating he received in 1983.

The court will not fix some arbitrary numerical rating for the 1985 performance evaluation. Instead defendants are directed to withdraw the "63.1" rating for 1985, and change it to read "favorable."

Since there is no jury finding pertaining to plaintiff's 1986 evaluation, no ruling will be made on that evaluation.

3. Attorney's fees.--In determining a reasonable fee, courts in this circuit are to consider the twelve factors enunciated in Johnston v. Georgia Highway Express, Inc., 488 F.2d 714, 717-719 (5th Cir. 1974), and apply them in a manner consistent with Hensley v. Eckerhart, 461 U.S. 424 (1983), Blum v. Stenson, 465 U.S. 886 (1984), and City of Riverside v. Riveria, ___ U.S. ___, 106 S.Ct. 2686 (1986).

1. Time and labor required.--The verified time spent on the case by plaintiff's counsel is 200.2 hours. Defendants acknowledge that this is a reasonable number of hours to have expended on the case.

2. Novelty and difficulty of the questions.--This case presented no new or novel issues of law.

3. Requisite skill.--The level of skill required of plaintiff's attorney in this First Amendment civil rights suit, a highly contentious and emotion laden case, was considerable.

4. Preclusion of other employment.--Plaintiff's counsel does not claim that he was precluded from accepting other employment because of this case.

5. Customary fee.--Plaintiff's counsel seeks $150.00 per hour. Defendants maintain that an hourly rate of $150.00 is excessive and that plaintiff's counsel should receive no more than $115.00 per hour.

Plaintiff's counsel has submitted affidavits from two attorneys who are familiar with his work and with the range of hourly fees charged in Charlotte, North Carolina, for civil rights cases. They both affirm that $150.00 per hour is within the Charlotte area range for federal court litigation.

Defendants have not submitted any evidence in support of their contention that an hourly rate of $150.00 is excessive.

Recent orders of this court have awarded $140.00 to $150.00 per hour to Charlotte attorneys whose experience and skill is similar to that of plaintiff's counsel. See, Norwood v. Charlotte Memorial Hospital, 653 F.Supp. 1350, 1354-1358 (W.D.N.C. 1987), vacated and remanded on other grounds, ___ F.2d ___ (4th Cir. 1987) unpublished opinion; Thomas v. Cooper Industries, Inc., 640 F.Supp. 1374 (W.D.N.C. 1986).

6. Nature of the fee.--Counsel was representing plaintiff on a contingency fee basis. Had plaintiff lost, counsel would have received no compensation for the 200.2 hours worth of work that he put into this case.

7. Time limitations.--There is no evidence or claim that the time limitations in this case were in any way unusual or

exceptionally demanding.

8. Results.--Defendants agree that from plaintiff's standpoint the results were as well as could be expected.

9. Experience of plaintiff's counsel.--Plaintiff's counsel is an experienced and able civil rights attorney. He has tried many successful civil rights cases in this court.

10. Undesirability of the case.--The fact that all the parties to this case are in the upper management of county government does not make it any more desirable than other civil rights cases, but as the term "undesirable" is used in attorney fee analysis, this was not an undesirable case.

11. Relationship with the client.--This factor favors neither a high nor a low lodestar fee.

12. Awards in similar cases.--This court has awarded a lodestar fee of $150.00 per hour in other employment discrimination

cases. Norwood v. Charlotte Memorial Hospital; Taylor v. Home Insurance Company, NO. C-C-82-98-M (W.D.N.C. May 23, 1986); Thomas v. Cooper Industries, Inc., 640 F.Supp. 1374 (W.D.N.C. 1986). However, the issues in those cases were of greater complexity than the issues raised by this case.

Based on the foregoing, the court finds that counsel for plaintiff should be compensated for 200.2 hours at $140.00 per hour.

The court does not agree with the defendants' suggestion that the lodestar fee be reduced by 20% on account of the "amicability enjoyed throughout [the proceedings]."

Plaintiff's counsel is entitled to recover attorney's fees of $28,028.00.

4. Costs and expenses.--Plaintiff is entitled to recover costs and expenses incurred in this litigation. Plaintiff's verified motion for relief shows that the costs and expenses incurred by plaintiff's

counsel from May 1, 1986 throuth September 28, 1987, total $2,570.96.

Defendants contend that plaintiff's photocopying costs are not recoverable, that $236.00 for service of process upon highly visible public officials ought not be compensable, and that $765.00 for subpoenas, witness fees, and service of process is excessive.

The court finds that all of the claimed expenses were reasonable, necessary to the litigation of this case, and compensable under the law.

On the basis of the foregoing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendants' motion for judgment notwithstanding the verdict is DENIED.

2. Plaintiff shall recover from the defendants as follows:

ISSUE NUMBER	AMOUNT	DEFENDANTS
1	$ 2,000.00	County, Fox
2	0	None
3	5,100.00	County, Weatherly
4	20,300.00	All
	$27,400.00	

3. Defendant shall restore plaintiff to the pay grade and job classification, i.e., SAM grade 3, step 7, he held prior to the unlawful reclassification of his position in January, 1985.

4. Plaintiff's salary shall be retroactively set at the rate appropriate to SAM grade 3, step 7, and plaintiff shall have and recover the resulting back-pay differential, from December 9, 1986, to the present.

5. Defendants shall change plaintiff's 1985 job performance evaluation rating from "63.1" to "favorable."

6. Defendants shall not retaliate in any way against plaintiff because of this suit or plaintiff's 1982 and 1983 communications with the District Attorney.

7. Plaintiff, as the prevailing party, is entitled to recover from the defendants $28,028.00 in attorney's fees and $2,570.56 for costs and expenses.

8. Interest shall be paid on all sums now payable, at the maximum rate allowed under North Carolina law, from December 9, 1986, the date of the jury verdict, until paid.

This /s/ 30 day of March, 1988.

/s/ James B. McMillan
James B. McMillan
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 88-2097

LLOYD BAKER

Plaintiff-Appellee

Filed
September 27,
1990

v.

MECKLENBURG COUNTY, NORTH CAROLINA; GERALD G. FOX, individually and county manager; LOUIS JOE STRICKLAND, individually and as personnel director; J. HARRY WEATHERLY, JR., individually and as finance officer

Defendants-Appellants

and

NATHAN E. ALBERTY,

Defendant.

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Ervin with the concurrence of Judge Hall and Judge Wilkins.

For the Court,

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
NO. C-C-86-0232-M

LLOYD BAKER, Plaintiff,	)
v.	)
MECKLENBURG COUNTY, et al., Defendants.	)

DEFENDANTS' MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT

The defendants, by and through their attorneys of record, hereby move pursuant to Fed. R. of Civ. P. 50(b) for judgment notwithstanding the verdict, and the basis for the motion is as follows:

1. At the close of the plaintiff's evidence, the defendants moved for directed verdicts pursuant to Fed. R. of Civ. P. 50(a) upon the basis (1) that the plaintiff's evidence with respect to his second cause of action (the pendent North Carolina tort of intentional infliction of emotional distress) was insufficient to make out a prima facie

case, (2) that the plaintiff's evidence with respect to Messrs. Strickland and Weatherly upon the first cause of action (alleged retaliation for exercise of First Amendment rights) was insufficient to go to the jury as those defendants because Messrs. Strickland and Weatherly had no knowledge or information with regard to the exercise of the First Amendment rights, and (3) that the plaintiffs remarks were to further his purely private interest in retaining or maintaining his position with the Finance Department and that the comments were, accordingly, not protected against employer retaliation by any of the defendants. All motions were denied without prejudice.

At the close of all the evidence, the defendants repeated all of their motions for directed verdicts. The defendants' motions with regard to the North Carolina tort of intentional infliction of emotional distress were granted. All other motions were denied.

This motion for judgment notwithstanding the verdict pertains to all issues answered in favor of the plaintiff and is made upon the third proposition mentioned above, i.e., that where the sole point or purpose of the plaintiff's remarks was to further his purely private interest of retaining or maintaining his own position with the Finance Department, his comments lacked First Amendment protection against employer reaction.

2. Natham Alberty was a defendant in this litigation. The plaintiff settled his claim against Mr. Alberty and, accordingly, has received satisfaction for whatever unlawful retaliation may have been administered by Mr. Alberty. The settlement is reflected by the plaintiff's stipulation of dismissal with prejudice with respect to his claims against Mr. Alberty, which stipulation was filed on November 18, 1986. Hence, only the alleged retaliation by the defendants Fox, Weatherly, and Strickland is at issue.

3. Our thesis is that First Amendment free speech protection applies to public employees no less but no more than to all other citizens. For example, the State may not make it a crime for citizens (including public employees) to criticize public officials with respect to public issues; nor may the State impose a civil penalty upon citizens (including public employees) for such criticism. When a public employee speaks as a concerned citizen upon public issues, he is protected just as are all other citizens; and this protection extends to employment retaliation, which happens to be a form of penalty that is uniquely available to the State with respect to a public employee. But when the speech or expression results purely from an employment dispute and when the subject is directly related to that dispute, the public employee is not speaking as a concerned citizen but is, rather, motivated solely to obtain or to retain something that

has value only to the particular public employee. In this context, and only for public employment purposes, the speech and the employer reaction to it may not be the subject of a 42 U.S.C. §1983 action because the speech has lost First Amendment protection against employer reaction, even though the speech remains protected under the First Amendment for all other purposes in precisely the same way that First Amendment protection would apply to similar speech by citizens at large.

4. On December 3, 1987, the defendants filed with the court a supplement to their trial brief, which supplement contains a recital of all of the relevant facts and circumstances and contains also all of the relevant authorities except one. The defendants hereby incorporate the supplement to their trial brief into this motion.

5. A copy of the supplement to our trial brief, which was filed on December 3,

1987, is attached to this motion. We wish to mention one additional case, which is Lewis v. Blackburn, 734 F.2d 1000 (4th Cir. 1984), rev'd 759 F.2d 1171 (en banc) (4th Cir. 1985), cert. den. ___ U.S. ___, 106 S.Ct. 228, 88 L.Ed.2d 228 (1985). Judge Ervin's dissent to the panel opinion (734 F.2d 1008-1012) became the opinion of the en banc Fourth Circuit by an overwhelming 8 to 2 vote (759 F.2d 1171 and 1172).

The facts in Lewis are relatively simple. Clerk Blackburn asked or directed Magistrate Lewis to do some additional microfilming in connection with her judicial duties. Magistrate Lewis spoke out against the microfilming assignment. Clerk Blackburn and Judge Snepp refused to renominate and appoint Ms. Lewis to her magistrate's position because of her vocal opposition to Clerk Blackburn's directive. Judge Ervin considered, explained and followed Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75

L.Ed.2d 708 (1983) in his opinion, which was adopted by eight members of the Fourth Circuit, and the gist of the opinion is as follows:

> In reaching the conclusion that Myers's speech was personal in nature, the [Supreme] Court wrote that 'whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record.' [citation to Connick v. Myers omitted] Here, it is beyond dispute that Lewis's complaints began upon learning that she would be assigned additional duties. The record as I view it is unequivocal that the motivation for her complaints was personal effrontery over being asked to do more work, not public-spirited concern over the administration of Justice. (734 F.2d at 1010)

6. In late 1980, Mr. Baker saw the document (Defendant's Exhibit 5), which confirmed Mr. Baker's suspicions that Mr. Alberty had padded his expense account with respect to a May, 1980 trip to Phoenix, Arizona. Mr. Baker kept this knowledge or information to himself from late 1980 until July 21, 1982 when he mentioned the subject

to Mr. Fox. On July 19, 1982 (Defendant's Exhibit 15), Mr. Alberty had reorganized the Finance Department by promoting Mr. Weatherly, which resulted in a loss of authority and a lessening of responsibility for Mr. Baker. This July 19, 1982 reorganization of the Finance Department caused Mr. Baker to run to Mr. Fox two days later with information and documents, some of which had been in Mr. Baker's possession for more than a year and a half, and caused Mr. Baker to run to the District Attorney within a few weeks thereafter. The obvious and irrefutable reason or purpose for Mr. Baker's conversations (his alleged First Amendment expressions) was Mr. Baker's purely personal concern about his position in the Finance Department. The plaintiff's concern did not exist until he was demoted. To paraphrase from Judge Ervin's language quoted above, the record is unequivocal that the motion for Mr. Baker's revelations with respect to Mr.

Alberty was concern over his July 19, 1982 demotion, not public-sprited concern that his superior may have padded an expense account or may have engaged in other financial improprieties. Based upon the undisputed facts and the authorities mentioned in this motion and in the December 3, 1987 supplement to our trial brief, judgment notwithstanding the verdict must be entered in favor of the defendants because Mr. Baker did not speak out as a citizen concerned with the integrity of the Finance Department but spoke only as an employee who was attempting either to avoid the unfavorable employment decision by Mr. Alberty or to injure Mr. Alberty if the decision stood.

This 17th day of December, 1987.

/s/ James O. Cobb

James O. Cobb
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2100 First Union Plaza
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(704) 377-1634

and

/s/ Tyrus V. Dahl, Jr.

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Attorneys for Defendants
Mecklenburg County, Fox,
Strickland, and Weatherly

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

(a) MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the

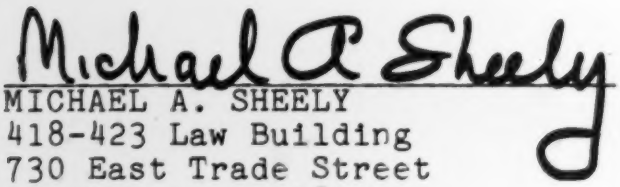
evidence is denied for for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered in accordance with the party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

X - CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served _____ copies of Baker's PETITION FOR CERTIORARI AND APPENDIX upon opposing counsel by depositing said copies in the United States Mail, postage prepaid, addressed as follows:

Mr. James O. Cobb
Ruff, Bond, Cobb, Wade & McNair
Attorneys at Law
Two First Union Center
Suite 2100
Charlotte, NC 28282-8283

This the _____ day of December, 1990.



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Attorney for Petitioner Baker

(2)

No. 90-1005

Supreme Court, U.S.
FILED
JAN 23 1991
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of The United States

October Term, 1990

LLOYD BAKER,

Petitioner,

v.

MECKLENBURG COUNTY, NORTH CAROLINA; GERALD G. FOX, individually and as County Manager; LOUIE J. STRICKLAND, individually and as Personnel Director; and J. HARRY WEATHERLY, JR., individually and as Finance Officer,

Respondents.

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Charlotte, NC 28282
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Counsel for all Respondents.

LIST OF PARTIES AND RULE 29.1 LIST

The Petitioner in this case is Lloyd Baker. The Respondents are Mecklenburg County, North Carolina; Gerald G. Fox, individually and as Mecklenburg County Manager; Louie J. Strickland, individually and as Mecklenburg County Personnel Director; and J. Harry Weatherly, Jr., individually and as Finance Officer of Mecklenburg County.

An individual named Nathan E. Alberty was an original defendant. Mr. Baker and Mr. Alberty settled their differences prior to the trial, and Mr. Alberty is not a party to this matter.

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No. 90-1005

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

LLOYD BAKER,

Petitioner,

v.

MECKLENBURG COUNTY, NORTH CAROLINA; GERALD G. FOX, individually and as County Manager; LOUIE J. STRICKLAND, individually and as Personnel Director; and J. HARRY WEATHERLY, JR., individually and as Finance Officer,

Respondents.

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINION BELOW

Except for a few insignificant typographical errors, the unpublished opinion of the United States Court of Appeals for the Fourth Circuit dated August 27, 1990, and the September 20, 1990 Amendment to the Unpublished Opinion are set forth accurately at App. 1-23 in the Petition for Writ of Certiorari.

RESPONDENTS' NOTE AS TO DATE OF SERVICE OF PETITION FOR WRIT OF CERTIORARI

The Petition For Writ Of Certiorari was prepared by a printing service and was filed in the Supreme Court on December 21, 1990. On page 24 of the Petition For Writ Of Certiorari (the last page in that booklet), the date of the mailing to the attorney for the Respondents is not stated. The attorney for the Respondents in fact received the Petition on December 26, 1990, although it is possible the Petition would have

been available to the attorney for the Respondents on December 24, 1990, except for the Christmas Eve and Christmas holidays. In any event, to the extent that attorneys for the parties have the authority or ability to do so, the attorney for the Petitioner and the attorney for the Respondents have agreed and stipulated that the Petition For Writ Of Certiorari may be considered as actually having been received by the attorney for the Respondents on December 26, 1990.

STATEMENT OF THE CASE

The complaint in the trial court contained two causes of action. The first cause of action was based upon the theory that Messrs. Fox, Weatherly, and Strickland, in their personal and in their individual capacities, violated Mr. Baker's rights under the First Amendment by

retaliating against him in his public employment because Mr. Baker had gone to the local District Attorney with allegations of financial improprieties concerning Mr. Alberty.

The second cause of action was a pendent state tort claim based upon alleged intentional infliction of emotional distress upon the plaintiff by all of the original defendants in connection with their alleged retaliatory actions with respect to Mr. Baker's employment.

At the close of the plaintiff's evidence, trial counsel for the present Respondents moved for a directed verdict under Fed. R. of Civ. P. 50(a). This motion or these motions and the colloquy between the trial court and Respondents' trial counsel is set forth at pages 507 through 526 of the appendix filed with the Fourth Circuit. The following are excerpts:

> At the close of plaintiff's

evidence, the defendants move for directed verdict pursuant to Rule 50A [sic] on several bases [sic].

. . . .

Yes, move first to dismiss the second cause of action, intentional infliction of emotional distress. The second motion is made on behalf of Mr. Strickland and Mr. Weatherly with respect to the first cause of action, that is, the First Amendment cause of action, because there isn't a shred of evidence that Mr. Strickland ever knew anything about the First Amendment statement and there isn't enough to go to the jury on Mr. Weatherly's alleged knowledge. There is zero.

. . . .

There's no evidence that Mr. Strickland ever knew that Mr. Baker had gone to Mr. Fox in July of 1982, and to the District Attorney in August of 1982, and to Mr. Fox and to Mr. Strickland in the spring of 1983 with the complaints about Mr. Alberty, none, not a shred. You can't retaliate against somebody for doing something that you don't know anything about. If you don't know somebody has experienced a First Amendment right, you can hardly be guilty of retaliating against them for having exercised

> that right . . . . I have just told [the court] the reason for Mr. Strickland, zero knowledge. As to Mr. Weatherly, the only evidence of any knowledge is from two or three of Mr. Baker's witnesses who said that Mr. Fox said at the July 16, 1983 meeting of the Finance Department, Mr. Fox made certain remarks and Mr. Baker got up and said words to the effect, "People are blaming me. I didn't go to the newspapers. I went to the District Attorney." That's literally all Mr. Weatherly can know, taking the plaintiff's evidence at face value . . . . [the motion as to] the second cause of action is to all three [Messrs. Fox, Strickland and Weatherly].[1]

---

1. Pages 58 and 59 of the Appendix in the Fourth Circuit contain stipulations, which were filed with the trial court. The stipulations included the following: "[A]t all times pertinent to this action Messrs. Fox, Strickland, and Weatherly were employees of Mecklenburg County; and all actions taken by these defendants were done under color of State law . . . . [A]ny compensatory liability and compensatory damages issues submitted to the jury under the first cause of action alleged in the complaint with respect to Mr. Fox, to Mr. Strickland, or to Mr. Weatherly will be so submitted without any delineation between personal capacity liability and official

> The first motion is that the second cause of action [intentional infliction of emotional distress] should be dismissed as to everybody, Fox, Strickland and Weatherly. The second motion is that the first cause of action should be dismissed as to Strickland and Weatherly for essentially the same reason unless they knew what Mr. Baker said to the District Attorney and to Mr. Fox. They can't be guilty of retaliating against somebody for saying something when they didn't know anything about it. And then I have a third motion if you are with me so far.
> . . . .
>
> Now, the third motion is on behalf of all defendants, which is upon the basis set out in the supplement to our trial brief and it tersely put is this: If an employee makes a statement which might otherwise be protected by the First Amendment, if that statement is made solely for the purpose of retaining his

---

(FN1 continued)
capacity liability, and the answer or answers to any such compensatory liability and compensatory damages issue or issues shall be effective as a jury finding or findings that both personal capacity liability and official capacity liability do or do not exist with regard to such issue or issues." In view of this stipulation, motions on behalf of the individual Respondents necessarily subsumed Mecklenburg County since Mecklenburg County was a party only because of the official capacity allegations against the individual Respondents.

> position and is not made as a citizen would make it, as a matter of public comment, then the statement is not protected.
> . . . .

All motions were denied without prejudice to renew.

This motion at the close of the plaintiff's evidence was for the dismissal of the second cause of action, the state tort of intentional infliction of emotional distress, as to all parties. A similar motion with regard to the pendent state tort claim was made at the close of all of the evidence and was granted by the trial court. Hence, the intentional infliction of emotional distress claim was of no consequence before the Fourth Circuit and is of no consequence now.

At the close of the plaintiff's evidence the clear contention was made that the First Amendment claim should be dismissed as to the

Respondents Strickland and Weatherly because there was not enough evidence to go to the jury upon this claim. Moreover, as shown in the material quoted above, the motions for a directed verdict included a contention "on behalf of all defendants" that the case should be dismissed as to all because the evidence failed to reveal that Mr. Baker's statements were protected by the First Amendment. As stated, all motions for directed verdict made at the close of the plaintiff's evidence were denied without prejudice to renew same.

At the close of all of the evidence, trial counsel for the Respondents made a number of motions for directed verdicts under Rule 50(a). The relevant portions of these motions are contained at pages 730 and 731 of the Appendix before the Fourth Circuit. These motions were as follows:

Now, as to the first cause of action, which is the First Amendment claim, my premise is that you can't retaliate against anybody for exercising the First Amendment rights unless you know they exercised them and there is not one shred of evidence that Joe Strickland ever knew anything that Mr. Baker may have said to Mr. Fox, July '82; to the District Attorney August of '82; to the District Attorney or Mr. Fox in the spring of 1983. Not a shred and it's just a fundamental proposition that you can't do somebody in for something you don't know anything about. So I think that cause of action [First Amendment claim] has to be dismissed as to Mr. Strickland.

The same argument is made on behalf of Mr. Weatherly. Taking the plaintiff's evidence at total face value, giving every doubt in his favor, all Mr. Weatherly ever heard -- all Mr. Weatherly ever knew was in a meeting Mr. Baker says, "I went to the D. A." Now, how, if he doesn't know what Baker allegedly said to the D. A., how can he [Weatherly] retaliate? . . . . So I think that there must be a directed verdict as to Messrs. Strickland and Weatherly as to the first count in the complaint.

> Now, I made a long argument yesterday and I'm not going to wear the Court out again on behalf of all the defendants. You didn't receive that well and I realize I'm not going to get anywhere with that, so I'm going to stop and say he [Mr. Baker] is entitled to go to the jury as to Mr. Fox because he [Mr. Fox] did have information, as to Mr. Fox alone and on the subject of Mr. Fox's recommendation, that Weatherly be named acting finance director -- I think that's confusing -- to the jury only as to that one defendant and only as to that one subject <u>because there is no other evidence that Mr. Fox did anything that adversely affected Mr. Baker's employment</u>. (emphasis supplied)

The only issue as to which this concession was made on behalf of Mr. Fox is the issue relating to the selection of Mr. Weatherly rather than Mr. Baker to be the Acting Director of Finance in June of 1983. This issue and the answer thereto are reproduced at App. 24 and 25 of the Petition For Writ Of Certiorari. This was a $2,000.00 issue and was of minor

importance in the total context of the case.

Except for this one concession, appropriate "insufficiency of the evidence" motions under Rule 50 were made on behalf of all defendants, including Mecklenburg County because of the stipulation quoted in footnote 1.

Despite these motions at the close of the plaintiff's evidence and at the close of all the evidence concerning the insufficiency of the evidence as to all parties, Mr. Baker made no effort to shore up his case even though the trial court explicitly asked whether there was any further evidence to be introduced.

The Respondents' Fed. R. of Civ. P. 50(b) motion for judgment notwithstanding the verdict has been reproduced (with two typographical errors corrected in our quotation at the asterisk marks) in the Petition For Writ Of Certiorari at App. 43-52. The relevant portion

of this motion is as follows:

> 1. At the close of the plaintiff's evidence, the defendants moved for directed verdicts pursuant to Fed. R. of Civ. P. 50(a) upon the basis (1) that the plaintiff's evidence with respect to his second cause of action (the pendent North Carolina tort of intentional infliction of emotional distress) was insufficient to make out a prima facie case, (2) that the plaintiff's evidence with respect to Messrs. Strickland and Weatherly upon the first cause of action (alleged retaliation for exercise of First Amendment rights) was insufficient to go to the jury as *to those defendants because Messrs. Strickland and Weatherly had no knowledge or information with regard to the exercise of the First Amendment rights, and (3) that the *plaintiff's remarks were to further his purely private interest in retaining or maintaining his position with the Finance Department and that the comments were, accordingly, not protected against employer retaliation by any of the defendants. All motions were denied without prejudice.
>
> At the close of all the evidence, the defendants repeated all of

> their motions for directed verdicts. The defendants' motions with regard to the North Carolina tort of intentional infliction of emotional distress were granted. All other motions were denied.
>
> This motion for a judgment notwithstanding the verdict pertains to all issues answered in favor of the plaintiff and is made upon the third proposition mentioned above, i.e., that where the sole purpose of the plaintiff's remarks was to further his purely private interest of retaining or maintaining his own position with the Finance Department, his comments lacked First Amendment Protection against employer reaction. (emphasis supplied)

The motion for a judgment notwithstanding the verdict was denied.

With a few minor, inconsequential typographical errors, the unpublished August 27, 1990 opinion of the United States Court of Appeals for the Fourth Circuit has been reproduced in the Petition For Writ Of Certiorari at App. 1-22. The critical portion

of the appellate opinion is as follows:

> Perhaps the sufficiency of the evidence argument could have been raised more clearly below in the motions for directed verdict and judgment n.o.v. However, we find that the defendants' Rule 50(a) motion for a directed verdict alerted the district court to this issue and that the defendants sought to renew this argument in the motion for judgment n.o.v. The cases cited by Baker in which the court refused to review an issue because it was not presented in a motion for a directed verdict at the close of all the evidence can all be distinguished because, in this case, the court below was adequately informed at the close of all of the evidence of the nature of the defendants' contention that there was a deficiency in the evidence.

Petition For Writ Of Certiorari, App. 8 and 9.

Mr. Baker's petition for rehearing and suggestion for rehearing in banc were denied on September 27, 1990. See Petition For Writ Of Certiorari, App. 41 and 42.

SUMMARY OF REASONS FOR DENYING THE WRIT

The overview propositions set forth below are from 5A, Moore's Federal Practice (2d ed. 1948 & Supp. 1990). Paragraph numbers have been inserted at appropriate places.

A motion for a directed verdict under Rule 50 should state the specific grounds therefor. This requirement, however, is not a technical one; its function is to assure that the trial court has an adequate basis for its decision. So long as the trial court understands the grounds for the motion, the specificity requirement is met. If a defendant moves for a directed verdict at the end of the plaintiff's case and again at the close of all the evidence, both motions can be considered together to determine whether the specificity requirement is

met. The key is whether the trial court understands the grounds for the motion. Id. at ¶50.04.

One of the primary reasons for establishing the motion for a directed verdict as a condition precedent to a motion for judgment n.o.v. is to avoid making a trap of the latter motion. When a motion for directed verdict is made, the party against whom the motion is directed still has the opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury. A motion for judgment n.o.v., without prior notice of alleged deficiencies of proof, comes too late for the possibility of cure except by way of a complete new trial. The requirement of the motion for directed verdict is thus in keeping with the spirit of the rules to avoid tactical victories at the expense of substantive interests. Id. at

¶50.08.

In this case, both the trial judge and Mr. Baker's counsel had ample knowledge from the motions for directed verdicts that the defendants were contesting the sufficiency of the evidence as to all issues. Despite this knowledge, Mr. Baker chose to offer no additional evidence after the motions for directed verdict were made at the close of all the evidence. Mr. Baker made no effort to shore up his case even though the trial judge explicitly granted him the authority to do so.

Mr. Baker's position necessarily is that the Fourth Circuit lacked the discretion to accept less than perfect motions for directed verdicts and a less than perfect motion for judgment n.o.v. despite the appellate court's determination that "the court below was adequately informed at the close of all of the

evidence of the nature of the defendants' contention that there was a deficiency in the evidence." Petition For Writ Of Certiorari, App. 8, 9. As we shall see in the next section of this Brief, many Courts Of Appeals have acted in similar fashion. Moreoever, we have found no appellate authority for the proposition that a Court Of Appeals is somehow confined in its appellate review by ambiguous language in a motion for judgment n.o.v., which motion explicitly makes reference to adequate motions for directed verdicts before the trial court.

The trial court and Mr. Baker were in fact adequately informed both at the close of the plaintiff's case and at the close of all the evidence of our contention that there was a deficiency in the evidence.

REASONS FOR DENYING THE WRIT

The cases cited by Mr. Baker in the Petition For Writ Of Certiorari all address the question of whether the specific questions sought to be raised upon appeal were presented to the trial court for determination by it in the first instance. None of these opinions addresses the sufficiency of a n.o.v. motion.

As we have seen from the language of the motions made by the Respondents' trial counsel, the Fourth Circuit in this case quite properly stated that "the court below was adequately informed at the close of all of the evidence of the nature of the defendants' contention that there was a deficiency in the evidence."

It is clear that a federal appellate court may dismiss a judgment below or order judgment n.o.v. where the verdict loser has made an

adequate motion for a directed verdict and has made a n.o.v. motion. Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S.Ct. 1072 (1967). Neely, however, did not purport to address the subject of technical requirements for the n.o.v. motion.

We will mention very briefly cases from several Federal Circuits in which the sufficiency of directed verdict motions at the trial level have been delineated. The cases mentioned below do not constitute an exhaustive itemization but do show that there is really no conflict among the Circuits where factual situations are similar.

The instant case does not represent a new departure by the Fourth Circuit from its established precedent. The underlying philosophy is illustrated by Virginia-Carolina Tie & Wood Co. v. Dunbar, 106 F.2d 383 (4th Cir.

1939). The Fourth Circuit's philosophy as stated in this early opinion is that technical precision is not required in stating the grounds of a Rule 50(a) motion "but merely that [the motion] should be sufficiently stated to apprise the [trial] court fairly as to movant's position with respect thereto." Id., at 385.

Another illustration from the Fourth Circuit is Federal Sav. and Loan Ins. Corp. v. Reeves, 816 F.2d 130 (1987). A plaintiff contended that the defendants failed to preserve a particular issue for appeal by failing to raise that issue in a motion for directed verdict. The Fourth Circuit said:

> However, rigid application of this rule is inappropriate, in a case like this, where such application serves neither of the rule's rationales-protecting the Seventh Amendment right to trial by jury, and ensuring that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting.

[citation omitted]

> The propriety of implying a civil cause of action from federal criminal statutes would not have been submitted to the jury, even if raised in time to do so. Moreoever, plaintiff had adequate notice of this challenge from defendants' answers to the complaint and amended complaint, and there is no suggestion that plaintiff could have produced any additional evidence that would have been pertinent to this legal issue. We will not be forced to recognize a cause of action because of a procedural error which did not prejudice the plaintiff.

Id. at 138.

The Fourth Circuit standard for review of the sufficiency of the evidence on appeal is not in conflict with other Circuits in similar factual situations.

Cortez v. Life Insurance Company of North America, 408 F.2d 500 (8th Cir. 1969), involved an action by an insurer seeking determination of its liability under an application for a life

insurance policy. The trial court entered a n.o.v. judgment, and the plaintiffs appealed. The appellants contended that the insurance company's motion to dismiss was fatally defective because not in compliance with Rule 50(a). In affirming the decision of the trial court, the Eighth Circuit observed:

> Technical precision is not necessary in stating grounds for the motion so long as the trial court is aware of the movant's position.
> . . . .
>
> In 5 Moore, Federal Practice ¶50.04, at 2338-2339 (2d ed. 1968), it is stated: "A motion for a directed verdict shall state the specific grounds therefor. Failure to state the grounds for the motion with specificity may provide grounds for denying the motion. But the requirement is not a technical one; its function is to assure that the trial court has adequate basis to pass on the motion. Thus, where 'the judge knew what counsel was driving at', or the 'court fully understood' the grounds for the motion, the motion was deemed sufficiently specific.

Defendant's motion at the end of the plaintiff's case will be considered together with his motion after all evidence is in to determine whether the specificity requirement is met. . . . "

Id. at 503 and 504, including footnote 3.

The Third Circuit has responded similarly. In an action brought against the manufacturer of a motorcycle and other defendants related to the motorcycle, the plaintiff received a substantial personal injury verdict. The trial court granted a judgment n.o.v. as to one defendant upon a particular issue, and the Third Circuit reversed the denial of similar motions on behalf of other defendants in Acosta v. Honda Motor Co., 717 F.2d 828 (3rd Cir. 1983).

In Acosta, the plaintiff contended on appeal that the defendants failed to make a sufficiently specific motion for a directed verdict at the close of the evidence. In sustaining the trial court's n.o.v. judgment as

to one defendant and in granting a similar judgment to other defendants, the Third Circuit said:

> Rule 50(b) is essentially a notice provision that, among other functions, protects the important seventh amendment right of trial by jury. A motion for a judgment n.o.v. must be preceded by a motion for a directed verdict sufficiently specific to afford the party against whom the motion is directed an opportunity to cure possible technical defects in proof which might otherwise make his case legally insufficient.
>
> . . . .
>
> We agree with plaintiff's observation that defendants' counsel could (and should) have stated the basis of their motion for a directed verdict with considerably greater specificity. The sole statement made by defendants' counsel in this regard was less than illuminating:
>
> > I move for a directed verdict on Counts 1 and the remaining counts, . . . under 402(1) [sic] theory which is . . . strict liability . . . and the negligence count which I believe are the only

> remaining counts in all of the complaints. . . .
>
> Ordinarily, and standing alone, this motion might not have served as a valid prerequisite to a motion for judgment n.o.v. as to punitive damages. But the communicative content, "specificity" and notice-giving function of an assertion should be judged in context. [citation omitted] In this case, a close examination of the record shows that, despite the imprecision of the sentences uttered by defendants' counsel at the time of his Rule 50(a) motion for a directed verdict, plaintiff's counsel and the court understood and responded to defendants' counsel as well as if he had been more specific at the time.

Id. at 831 and 832.

An individual named Thezan received injuries while serving upon a seagoing vessel. Mr. Thezan was dissatisfied with a jury verdict and filed a n.o.v. motion (among other motions), which was denied by the trial court. On appeal, Mr. Thezan argued that the trial court erred in its failure to grant his n.o.v. motion with

respect to a particular issue. The defendants/appellees contended that Mr. Thezan was precluded from appellate review of the issue because he failed to move for a directed verdict at the conclusion of the case. In Thezan v. Maritime Overseas Corp., 708 F.2d 175 (5th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S. Ct. 729 (1984), the Fifth Circuit said the following:

> The appellees contend that Thezan failed to move for a directed verdict at the conclusion of the case, thus precluding appellate review of this issue. . . . Our review of the record reveals that Thezan did move for a directed verdict at the close of appellee's case, but that his grounds for his motion were less than precise. Rule 50(a) of the Federal Rules of Civil Procedure requires that specific grounds be stated in a motion for a directed verdict. The purpose of this requirement is to apprise the trial court of the movant's position. [citation omitted] Courts have held that technical precision is not necessary in stating grounds for the motion so long as counsel's argument made clear the defenses he

> was relying upon. [citations omitted] While there is no doubt that the appellant's motion could have been more accurately stated, we find that it was sufficient to make the trial court aware of his position, thus preserving the issue for appeal.

Id. at 179, n.2.

A similar Fifth Circuit opinion is Texoma AG-Products v. Hartford Acc. & Indem., 755 F.2d 445 (5th Cir. 1985). Texoma contended that Hartford could not raise a sufficiency of the evidence objection in the appellate court because of Hartford's failure to move for a directed verdict at the close of the evidence. The Fifth Circuit did indeed consider the specific sufficiency of the evidence question because Hartford "did object to the court's charge to the jury on these grounds, and in doing so presented the issues to the district judge and with the effect of a directed verdict

motion." Id. at 448.

As we have stated earlier, there is no conflict among the Circuits in factually similar cases. The Respondents' motions for directed verdicts, taken together, meet the specificity requirement of the relevant rule, as defined by many appellate decisions.

Where, as here, the trial court and Mr. Baker's counsel knew of the Respondents' position concerning the sufficiency of the evidence, and where Mr. Baker's counsel declined an invitation by the court to offer additional evidence, the purpose of Rule 50 has been served.

CONCLUSION

The United States Court Of Appeals for the Fourth Circuit correctly decided this case and correctly concluded from the entire record

before it that the court below (and Mr. Baker's counsel as well) "was adequately informed at the close of all the evidence of the nature of the defendants' contention that there was a deficiency in the evidence." The Respondents, therefore, urge that the Petition For Writ Of Certiorari be denied.

Respectfully submitted,

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January 23, 1991.